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No. 06-332

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

PHYLLIS BROWN,

Petitioner,

v.

DEKALB COUNTY, GEORGIA

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Georgia

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

In its Brief in Opposition ["Op. Cert."], Respondent appears to question the legal, factual and pleading premises of the decision below, an opinion that it ostensibly endorses in counseling this Court to deny certiorari. Although Respondent does not challenge this case as an appropriate vehicle for resolving the issues raised, it does question whether there can be any real interplay between Eleventh Amendment "arm of the State" analysis and section 1983 officer status determinations.

1. Respondent questions whether this action was properly brought against Dorsey in his official capacity. See Op. Cert. (ii). At the time this suit was filed (in November 2002; see Op. Cert. Pet. 26a), it was unnecessary for plaintiffs, in order to gain section 1983 relief against Respondent, to sue Dorsey, and his minions, in their official capacity. After the Eleventh Circuit's rulings in *Grech v. Clayton County*, 335 F.3d 1326 (11th Cir. 2003); *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003), plaintiffs were given leave to amend their complaint to add an official capacity claim against the individual defendants. See Op. Cert. App. 28 (Amended Complaint, ¶ 3 (August 2003)). The state trial court understood the legal effect of this amendment, even as it ruled that the County would not be liable for Dorsey's and his deputies' conduct. See Pet. App. 19a ("The purpose of bringing suit against any of these individual Defendants in his official capacity is to establish DeKalb County's liability and to recover from DeKalb County."). So did the Georgia appeals court. See Pet. App. 4a & n.1.

2. Next, Respondent repeatedly observes that this case does not involve the Eleventh Amendment. Op. Cert. 8-9, 12-13. It is, of course, quite correct. Eleventh Amendment immunity cannot be directly implicated in a case brought, and maintained, in state court. But Respondent apparently misses

the point – not only of the ruling below (and other appeals court decisions), but also of this Court's jurisprudence – that determination of officer status, under section 1983, can be influenced by Eleventh Amendment "arm of the State" analysis.

As already noted, see Pet. 13, this Court's discussion in *McMillian v. Monroe County*, relied on such "arm of the State" idioms. See 520 U.S. 781, 786 (1997) (citing *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425 (1997)); see also *Will v. Michigan Dep't State Police*, 491 58, 66-67 (1980). The court below, in relying on *McMillian*, was informed by this examination. See Pet. App. 12a-13a. More significantly, and despite Respondent's protestation, Op. Cert. 7, the Eleventh Circuit's "arm of the State" discussion in *Manders* was, indeed, relied upon by the Georgia courts in reaching the result that Georgia sheriffs are State officers. See Pet. App. 10a-11 n.23, 22a.

While Respondent asserts that this case has nothing to do with the Eleventh Amendment, courts have been routinely employing "arm of the State" reasoning in resolving §1983 officer status. The cases Petitioner earlier cited, Pet. 12-18, all involved the use of "arm of the State" factors in deciding whether a §1983 defendant was acting for the State, for purposes of liability under that provision. In the federal appeals courts, discussion of Eleventh Amendment immunity has not been generic or ancillary, merely owing to the fact that the case was being litigated in federal court, but, rather, closely connected to whether an official was a final policy-maker for the State in relation to the conduct leading to the suit. See, e.g., *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219, 221-25 (4th Cir. 2001); *Hudson v. City of New Orleans*, 174 F.3d 677, 681-82 (5th Cir. 1999); *Franklin v. Zaruba*, 150 F.3d 682, 684-85 (7th Cir. 1998); *Streit v. County of Los Angeles*, 236 F.3d 552, 566-67 (9th Cir. 2001); *Abusaid v. Hillsborough County Bd. of Comm'rs*, 405 F.3d 1298, 1310-13 (11th Cir. 2005).

And, as already noted, Pet. 18, the Eleventh Circuit's *Manders* decision expressly employed peculiar "arm of the State" idioms to characterize Georgia sheriffs as State officials in cases involving the use of force at county jails, even though the State fisc would not be chargeable for any judgment against a county sheriff. See 338 F.3d at 1309 n.9, 1324-25 (discussing *Hess*, *Regents*, and *Auer v. Robbins*, 519 U.S. 452 (1997)). The split in authority between various courts of appeal (federal and state) is real and palpable, and turns on the proper role that "arm of the State" factors (including the essential calculus of whether the State treasury is responsible for a judgment against an entity) should have in the §1983 officer status inquiry, aside and apart from the other factors mentioned by this Court in *McMillian*.

3. It is up to this Court to articulate a sensible basis for the overlay of "arm of the State" jurisprudence on §1983 officer liability. Petitioner is not seeking uniform outcomes, because such will, indeed, change from state to state, from officer to officer, and in regard to particular functions and activities giving rise to §1983 liability. It is not unreasonable, however, to seek a uniform standard, something which is manifestly absent from the decisional law in the decade following *McMillian*. And, despite Respondent's suggestion, Op. Cert. 4, it is not enough to utterly defer to state law characterizations of officer status, and to state court rulings on this subject. If taken literally, such would mean that this Court has no plenary authority to rule at all in these cases, a position that was roundly rejected in *McMillian*. See 520 U.S. at 786 (quoting *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 429 n.5 (1997)).

There should be no doubt that, depending on which standard of section 1983 officer status is adopted here, the outcome of this case will most certainly be affected. Petitioner will be prepared to argue, see Pet. 23, that even under the *McMillian* factors, Georgia sheriffs are not State officers. The

constitutional and legal status of Georgia sheriffs, under Georgia law, is different from that of sheriffs in Alabama.[1] Among other things, Georgia sheriffs (unlike those in Alabama) are constitutionally declared to be county officials. GA. CONST. Art. IX, § 1, ¶ III(a). At least until the underlying decision here, in which Georgia's courts followed the lead of the Eleventh Circuit, Georgia case law was consistent in characterizing sheriffs as county officers. See *Truesdel v. Freeney*, 197 S.E. 783, 786 (Ga. 1938); see also *Manders*, 335 F.3d at 1354-56 (Barkett, Kravitch, Tjoflat, JJ, concurring) (collecting cases). Even if subject to some state-law regulation, such is not pervasive (in contrast to Alabama) and cannot convert Georgia sheriffs into State agents. See id. at 1357-64.

In addition to all of this, Petitioner is prepared to submit that if "arm of the State" analysis is overlaid here, and proper emphasis is given (as this Court has consistently held) to whether the State fisc is at risk of satisfying a judgment against a Georgia sheriff, then that would be conclusive in ruling that Georgia sheriffs are not State officers. And insofar as Georgia sheriffs are independent constitutional officers, it is improper to assume (as both the Eleventh Circuit and the Georgia appeals courts have done) that if they are not truly county officials, then they must be State agents. Petitioner has already noted a "third way" in the case law, see Pet. 19-23 (discussing *Franklin*, 150 F.3d at 1685; *Cash*, 242 F.3d at 226), which places the section 1983 officer status analysis on the proper footing: questioning whether the local official is really and effectively a State agent.

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[1] Ironically, Alabama courts recognize the differences. See *Parker v. Amerson*, 519 So. 2d 442, 445 (Ala. 1987) ("Other states. . . have constitutions that expressly define sheriffs as 'county officers'.") (citing Georgia, Illinois, Tennessee, Florida, and New York constitutions).

4. Respondent notes that this Court has denied review in earlier cases raising the same issue here. Op. Cert. 5 n.13. Petitioner is mindful of this, but would submit that problems as to the fundamental basis of §1983 officer status, and the relevance of "arm of the State" factors, have festered long enough. All relevant lower courts (state and federal) have now ruled on the status of Georgia sheriffs. It should be time for this Court to articulate a sensible standard for making these status determinations, one that takes into account variations in the position of local officials between States, and also recognizes that not all powerful and autonomous local officers are *ipso facto* State agents.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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